STATE OF MICHIGAN

COURT OF APPEALS

TOP O'MICHIGAN RURAL ELECTRIC COMPANY,

Plaintiff-Appellee,

v

MACDONALD BROADCASTING COMPANY,

Defendant-Appellant.

UNPUBLISHED
December 3, 1999

No. 209315
Emmet Circuit Court
LC No. 97-004243 CK

Before: Holbrook, Jr., P.J., and Zahra and J.W. Fitzgerald*, JJ.

PER CURIAM.

This case arises from a lease agreement between plaintiff and A.J. Walker Communications, Inc. - Charlevoix ("Walker") which allowed plaintiff to install, maintain and operate an antenna on Walker's radio tower located in Charlevoix County. In 1993, as a result of a lawsuit by one of Walker's creditor's, the Charlevoix Circuit Court appointed a receiver to take the necessary steps to complete the sale and transfer of Walker's assets for the benefit of Walker's creditors.

Defendant entered into an asset purchase agreement ("APA") with the receiver to purchase a portion of Walker's assets, including the radio tower and the land on which it sat, but not assuming the lease between plaintiff and Walker. The APA was approved by the court in September, 1994 after notices were sent to Walker's creditors.[1] In March, 1995, plaintiff was notified in writing and in person that defendant did not accept any obligations under the lease plaintiff had with Walker and offered to negotiate a new lease. Plaintiff never intervened or asserted its rights under the lease in the Charlevoix proceedings prior to termination of the receivership in October, 1995.

In June, 1997, plaintiff commenced the instant action in the Emmet Circuit Court seeking declaratory and injunctive relief to enforce the lease against defendant. In a written opinion, the trial court denied defendant's motion for summary disposition and granted plaintiff's motion for summary disposition finding that (1) plaintiff was denied due process in the Charlevoix proceedings, and (2) plaintiff's lease with Walker was valid and binding on defendant as the successor/assign of Walker. Defendant now appeals as of right. We reverse.

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

Defendant first argues that the instant action was an improper attack on a prior Charlevoix Circuit Court order and is barred by the doctrine of collateral estoppel. We disagree. The applicability of collateral estoppel is a question of law that is reviewed de novo. *McMichael v McMichael*, 217 Mich App 723, 727; 552 NW2d 688 (1996). Collateral estoppel precludes religitation of an issue in a subsequent, different cause of action, between the same parties when the prior litigation culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Porter v Royal Oak*, 214 Mich App 478, 475; 542 NW2d 905 (1995). Critical to the assertion of collateral estoppel is the requirement that the respective litigants were parties or privies to an action in which a valid judgment has been rendered. *Duncan v State Hwy Comm*, 147 Mich App 267, 270; 382 NW2d 762 (1985). Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. A party in this connection is one who is directly interested in the subject matter and had a right to make a defense, or to control the proceedings, and to appeal from the judgment. *Id*. at 271. A privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties. *Id*. Moreover, for collateral estoppel to apply, it is necessary for the issue in the subsequent action to be identical to that determined in the prior action. *Amalgamated Transit v SEMTA*, 437 Mich 441, 451; 473 NW2d 441 (1991).

Plaintiff in this case was never a party or privy in the prior receivership action involving defendant. Moreover, the issue of the validity of plaintiff's lease with Walker, after defendant's purchase of Walker's assets, was never actually litigated. Because none of the elements of collateral estoppel were satisfied, we find that the trial court properly declined to apply the doctrine in the instant case.

Defendant next argues that the trial court erred in concluding that plaintiff was denied due process in the receivership action. We agree. Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker. *Traxler v Ford Motor Co*, 227 Mich App 276, 288; 576 NW2d 398 (1998). Notice of litigation must be reasonably calculated to give the interested party actual notice of the proceedings and an opportunity to be heard. *Wojnicz v Michigan Dep't of Corrections*, 32 Mich App 121, 124; 188 NW2d 251 (1971).

Here, plaintiff had constructive notice prior to the approval of the sale that defendant did not intend to accept assignment of the lease between plaintiff and Walker. It is undisputed that the petition for approval of the sale was sent to Walker's creditors and was published for five consecutive weeks in the *Charlevoix Courier*. The petition made reference to the APA, which provided that defendant would not assume any of Walker's contractual obligations including leases, except those specifically included in an attachment to the APA. Plaintiff's lease with Walker was not listed in the attachment to the APA.

Moreover, plaintiff admitted receiving written and oral notification in March, 1995, that defendant would not honor plaintiff's lease with Walker. However, plaintiff took no steps to assert its rights under the lease in the Charlevoix Circuit Court prior to the termination of the receivership in October, 1995. Instead, plaintiff sat on its rights for almost two years after the receivership was

terminated before filing the instant suit in a different venue. Because plaintiff was provided with timely and sufficient notice to enable it to make an objection or take other action prior to the termination of the receivership, we cannot conclude that plaintiff was denied due process in the Charlevoix Circuit Court proceedings.

Defendant also argues that the trial court erred in concluding that defendant was Walker's successor/assignee and that the lease between plaintiff and Walker was binding on defendant. We agree.

Generally, where one corporation sells its assets to another, the purchaser is not responsible for the obligations of the seller. *Shue & Voeks, Inc v Amenity Design & Mfg, Inc*, 203 Mich App 124, 127-128; 511 NW2d 700 (1993). However, obligations will be considered assumed under certain circumstances: (1) where two or more corporations consolidate and form a new corporation making no provision for the payment of the old corporation's debts; (2) where the purchasing corporation either expressly or impliedly agrees to assume the obligations; (3) where the new corporation is a mere continuance of the old; or (4) where the sale is fraudulent. *Id*. at 128.

In this case, defendant was neither a new corporation nor the mere continuance of Walker after completion of the sale, and there was no allegation by plaintiff that the sale of Walker's assets to defendant was fraudulant. More importantly, defendant did not expressly or impliedly agree to assume plaintiff's lease with Walker when it purchased Walker's assets. To the contrary, defendant expressly refused to be bound by the lease and this refusal was part of the bargain for purchase between the receiver and defendant. Defendant, therefore, was not a successor to Walker for purposes of its lease to plaintiff.

Under Michigan law, the scope of an assignment is gathered from the assigning instrument as a whole, as well as the surrounding circumstances. *State Mutual Life Assurance Co v Deer Creek Park*, 612 F2d 259, 266 (CA 6, 1979); *Keyes v Scharer*, 14 Mich App 68, 72; 165 NW2d 498 (1968). Defendant in this case expressly refused to accept "any obligations or liabilities of the Seller, including . . . lease obligations . . ." except as provided in the Asset Purchase Agreement (APA) entered into between defendant and the receiver. The APA delineated which contractual obligations defendant agreed to assume with the purchase of Walker's assets and plaintiff's lease was not one of them. Under these circumstances, we conclude that the trial court erred in finding that defendant was bound by the lease as the successor/assignee of Walker.

Accordingly, we find that the trial court erred in granting summary disposition to plaintiff and in denying defendant's motion for summary disposition.

Reversed and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Brian K. Zahra
/s/ John W. Fitzgerald

[1] Plaintiff's attorney admitted at the hearing on the motions for summary disposition that plaintiff was one of Walker's creditors.